

The abundance of the testimony is consistent that Claimant did not, at any point provide notice that her right elbow was hurting as a result of the work she performed for [respondent]. In fact, no notice of injury occurred. *While Respondent admits that claimant provided notice of a back injury*, Claimant was specifically questioned regarding whether the injury was a result of her employment. She was [noncommittal] to Mr. Manion and denied her condition was work related to

Mr. Rodgers. She did not report her back problems to be work related when she treated at the Emergency Room. Even if it can be deemed that the employer had notice of the back injury, it cannot be said that they had any notice that it was related to her employment with [respondent]. For Administrative Law Judge Klein to conclude otherwise is against the weight of credible evidence.<sup>1</sup> (Emphasis added.)

Respondent contends it was not until May 27, 2008, that it learned claimant was alleging her injuries were related to work. On that date respondent received a written demand for compensation.

Conversely, claimant requests the Board to affirm the January 23, 2009, Order. Citing numerous older appellate decisions, claimant maintains the information she provided respondent "*en toto* was sufficient to constitute notice of injury."<sup>2</sup> What is more, claimant asserts the Board should give deference to Judge Klein's finding of notice as respondent has raised a "curtain of denial," which the Judge was able to separate by observing the witnesses testify and measuring their credibility.

The only issue raised before the Board on this appeal is whether claimant provided respondent with timely notice of her alleged accidental injuries.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant worked approximately a year and a half in respondent's finishing department. The first three or four months of that period claimant was placed there by a temporary employment agency. Claimant's job was sanding carbon fiber body panels for aircraft. She used an air-powered orbital sander.

Claimant, who is right-hand dominant, used her right arm to sand. After performing that job for a while claimant developed pain in her right elbow. Her symptoms eventually developed to the point that by the end of the workday her pain restricted the movement in her arm. Claimant testified that within a month or two of the start of her elbow symptoms she told her supervisor, Travis Dodson, that she was having elbow pain. But according to

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<sup>1</sup> Respondent's Brief at 6, 7 (filed Feb. 16, 2009).

<sup>2</sup> Claimant's Brief at 6, 7 (filed Feb. 26, 2009).

claimant, Mr. Dodson disregarded her complaints and told her that she was lazy and would not do her job.<sup>3</sup>

The same day claimant reported her conversation with Mr. Dodson to Arnot Munguya, who was respondent's human resources manager at the time. Claimant testified in part:

I told [Mr. Munguya] that I had problems with Travis [Dodson], that I was, that I went to him and I asked him that, I was having problems with my elbow and he ignored me and I told him that he insulted me from by telling me that, that I was lazy, that I was just complaining. And that I just didn't want to do my work. I told him that he would talk to me really rude with a loud voice. And he set there and started taking notes.<sup>4</sup>

Approximately a month later, Mr. Dodson was terminated and claimant began working for other supervisors. And as she continued to work, her right elbow pain increased. What is more, claimant began experiencing pain in her low back, which she first noticed while bending and sanding.

Claimant testified that she told her new supervisor, Kelly Manion, about her back complaints but he ignored her.<sup>5</sup>

As a matter of fact, we told him I mean I told him that my back was hurting me because I was in that table that you go lower to sand so that that is, and I don't know what you call that, that machine, but that goes inside of it, when we sand, and I was telling him that every time I go over there and sand and start bending and bending for ten hours it was hurting me. And he said, sorry, that's the rules, we have to use that machine.<sup>6</sup>

Claimant testified that she continued working and when she reached the point she was unable to tolerate the pain any longer she again spoke to Mr. Manion, who allegedly advised her to go to the emergency room.

Records from the Via Christi Regional Medical Center emergency department indicate claimant visited its emergency room at 6:05 a.m on January 8, 2008, with

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<sup>3</sup> P.H. Trans. at 15.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> *Id.* at 19, 20.

complaints of low back pain that had persisted for approximately one month. Claimant was given medications and told to follow up with the GraceMed Health Clinic.

According to claimant, she later called Mr. Manion and told him she did not want to work due to her back and the medications, which were making her drowsy. And when she attempted to return to work following the January 8, 2008, visit to the emergency room she was told she needed to obtain a release to return to work. Accordingly, claimant went to the Hunter Health Clinic on January 11, 2008, to obtain that release. But when claimant took the release, which indicated she had a back injury, into work she was terminated. It appears the last day that claimant actually worked for respondent was January 7, 2008. And on January 14, 2008, claimant was terminated allegedly due to a lack of work.

In addition to speaking with Mr. Dodson and Mr. Manion about her symptoms, claimant also testified she told respondent's then production manager, Adrian Rodgers, in December 2007 about her back complaints. Claimant testified in part:

Mr. Adrian [Rodgers] was, every morning he walks and checks in our departments. And I was in there, and I told him, I said, Adrian, I am having problems with my back. And he just smiled and put his hand on my back and rubbed my back and said, are you okay? And I said, well, it's my back, I am having problems with my back. They didn't put too much attention of what I was saying. He just left the floor and didn't say nothing else.<sup>7</sup>

Claimant filed a sexual harassment complaint against respondent based, in part, on that alleged incident.

Finally, claimant also alleges she informed her group leader, Brenda, about her back symptoms.

On the other hand, Rhonda Graham, who replaced Mr. Munguya as respondent's human resources manager, testified that claimant never told her about her right elbow symptoms and that claimant never attributed her low back symptoms to work. In addition, former plant supervisor Travis Dodson, whom respondent terminated in approximately August 2007, testified he did not recall claimant complaining to him of either right elbow or low back pain.

Kelly Manion, who transferred from a customer service representative to become claimant's supervisor in January 2008, testified that claimant never reported right elbow or low back problems to him. Although Mr. Manion acknowledges that claimant called him

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<sup>7</sup> *Id.* at 24.

sometime in January 2008 to advise she was seeking medical treatment, he denies he directed her to any particular provider. Mr. Manion described the conversation, as follows:

I'd say it was approximately 6:00, 6:30 in the morning, she called in and said she would not be in that day. She did state that her back was hurting, and I did ask her if this was a work thing or if she'd hurt it elsewhere, and she said that she just had had back problems.<sup>8</sup>

Later that same morning, Mr. Manion told Mr. Rodgers that claimant had called in and that claimant had said her back trouble was not work-related.<sup>9</sup>

Arnot Munguya, who left respondent's employment on December 31, 2007, testified that while he was working for respondent claimant never advised him of right elbow problems and that he did not recall claimant complaining of low back symptoms.

Judge Klein had the opportunity to observe claimant and Ms. Graham testify. But the testimonies of Mr. Manion, Mr. Dodson, and Mr. Munguya were presented by deposition. And Mr. Rodgers' statement that claimant did not relate any work-related back or right elbow injury to him before she was terminated was provided by affidavit.

The Workers Compensation Act requires that an employer be given notice of an accidental injury within 10 days of its occurrence. But that period may be extended to 75 days if the worker can prove there was "just cause" for failing to provide notice within the initial 10-day period.<sup>10</sup> Judge Klein found claimant's testimony credible and, consequently, determined claimant had provided respondent with timely notice of her right elbow and low back injuries.

Giving deference to the Judge's assessment of claimant's credibility, the undersigned Board Member likewise finds that claimant has established she provided respondent with timely notice of her injuries. The medical records tend to substantiate claimant's testimony that she continued to work despite her back pain and that she was told to obtain a medical release before she could return to work. Moreover, the medical records do not indicate that claimant injured her back someplace other than work. And although the medical release from Hunter Health Clinic indicated claimant had injured her back, respondent did not inquire about that injury at the time of claimant's termination.

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<sup>8</sup> Manion Depo. at 12, 13.

<sup>9</sup> *Id.* at 16.

<sup>10</sup> See K.S.A. 44-520.

What is more, during the time in question, there was substantial turnover in claimant's supervisors. Indeed, Ms. Graham assumed the position of human resources manager when Mr. Munguya left on December 31, 2007, and about the same time Mr. Manion became claimant's supervisor. As Ms. Graham indicated there had never been a claim for a repetitive trauma injury while she had been working for respondent, it is evident respondent's experience with such injuries is limited. In addition, there was no evidence that Mr. Manion had any experience dealing with or recognizing alleged repetitive trauma injuries in his former position as a customer service representative.

In short, the undersigned finds by a slim margin that before her last day of work claimant notified respondent of her right elbow and low back complaints and advised respondent that those complaints were related to her work. Accordingly, claimant provided timely notice to respondent and she is entitled to receive workers compensation benefits for those alleged injuries. The January 23, 2009, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>11</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member affirms the January 23, 2009, Order entered by Judge Klein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant  
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>11</sup> K.S.A. 44-534a.